United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-2079

To Be Argued By
Andrew C. Hartzell, Jr.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2079

M. SPIEGEL & SONS OIL CORP.,

Plaintiff-Appellee,

-against-

B. P. OIL CORP., Defendant-Appellant, and
STANDARD OIL COMPANY (SOHIO),

Defendant.

On Appeal from the United States District Court for the Eastern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Spiegel's answering brief is replete with factual misstatements and with assertions irrelevant to this appeal, all designed to emotionalize the dispute, to cast BP as a

predator, to portray Spiegal as a small, helpless victim, and to make this Court think that BP is trying to cut off Spiegel's gas supply in violation of the EPAA and to destroy Spiegel's business by foreclosing on 26 gas station properties so that BP can take over these properties for itself.

The picture Spiegel paints is false. The facts in the record and as stated in BP's main brief at pages 5-14 accurately and precisely describe the Spiegel/BP background and the present situation. These facts show: that BP, with less than 1% of the New York metropolitan market and dependent entirely on outside purchases for its crude oil supply (A 144-45), decided in 1970-71 not to renew the five unprofitable metro-distributors' contracts as they expired (A 143-44, 182-88); that Spiegel was given notice in November 1971 that it should plan for this termination 19 months later in June 1973 (A 143); that Spiegel delayed in making enough alternative supply arrangements and the energy shortage caught up with it in 1973; that Spiegel then brought suit in New Jersey in April 1973 to prevent termination; that the federal court there denied Spiegel's repeated requests for a restraining order on May 1 and again on June 30, 1973 as the contract expired (A 262-63), and on July 11, 1973, denied Spiegel's request for a

preliminary injunction; that BP, even after the restraining order was denied, extended in altered form its arrangements with Spiegel for an additional year and Spiegel signed a July 11, 1973 contract which provided for this extension and also released all Spiegel's antitrust and related claims against BP; that after taking full advantage of that contract for the full additional year, and never questioning it (A 264-68), and in fact expressing appreciation without the slightest suggestion of "duress" (A 153-56), Spiegel on June 20, 1974 brought the present suit, seeking a further continuation from BP, and, in addition, repudiating the prior contract on the grounds of "duress" and realleging all the antitrust and other claims released a year previously. These are the facts, most of which are only peripherally relevant to the issues on this appeal. The facts show that Spiegel has been taking advantage of BP--repeatedly--and is continuing to do so, rather than the other way around. The distortions in Spiegel's answering brief do not change these facts.

ISSUES ON APPEAL

I

Jurisdiction

A. This Court Has Jurisdiction Over All Issues as a Result of Its Jurisdiction Over the Appeal from the Injunction

Four issues are on appeal to this Court: (i) the denial of BP's transfer motion; (ii) the denial of BP's request for a stay of the New York action pending final determination of the New Jersey action; (iii) the grant of an injunction requiring continued gasoline supplies; and (iv) the grant of an injunction prohibiting collection of Spiegel's debt to BP. The first two issues are properly before this Court as an adjunct to its consideration of BP's appeal on issues (iii) and (iv). Semmes Motors Inc. v. Ford Motor Co., 429 F.2d 1197, 1201 (2d Cir. 1970). Spiegel does not dispute the proposition that, if this Court has jurisdiction to hear the appeal of issues (iii) and (iv), it can at the same time hear the appeal on issues (i) and (ii).

By its motion to dismiss, however, Spiegel has challenged the Court's jurisdiction to consider issues (iii) and (iv), arguing that appeal of these injunction issues can only be taken to the Temporary Emergency Court of Appeals

("TECA"). As BP's brief dated November 14, 1974 in opposition to the motion to dismiss shows, decision of these injunction issues does not require, with one exception, consideration of issues under the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627 ("EPPA") and there is no reason, therefore, why this Court cannot hear them. BP's position on this point is fully stated in its November 14, 1974 brief, to which the Court is respectfully referred.

B. The District Court's Denial of the Stay Is Itself Appealable

Even if the Court should determine, and we submit it should not, that appeal of issues (iii) and (iv) could only have been taken to the TECA, this Court should nonetheless hear BP's appeal on issues (i) and (ii) because the denial of the stay itself was, in the peculiar circumstances of this case, equivalent to the denial of an injunction, and hence itself appealable under 28 U.S.C. § 1292(a)(1). The criteria for determining when denial of a stay constitutes denial of an injunction have been established by a line of cases in the Supreme Court and this Court. Under the rule of these cases, reviewed in Lyons v. Westinghouse Electric Corporation, 222 F.2d 184, 190-92 (2d Cir. 1955), if an action is essentially an action

at law and the judge is requested in his role as chancellor to stay the legal proceeding pending determination of an equitable defense or counterclaim, his refusal to grant the stay is a refusal to enjoin the legal proceeding, and is appealable.* Enelow v. New York Life Insurance Co., 293 U.S. 379, 381-83 (1935); Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 451-52 (1935); Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188, 190-91 (1942).

Counts II and IV-XVI in Spiegel's complaint in the New York action are actions at law alleging antitrust violations, torts, a securities violation, and breaches of contract. BP's request that Judge Judd stay consideration of these counts pending determination by the New Jersey court of the validity of the settlement agreement was a request for equitable relief--relief that could not be given by a court of law--for two reasons.

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* On the other hand, if the action is essentially equitable, and the judge is requested to stay one segment of the equity action in order to determine an equitable defense or counterclaim, his refusal is simply the administration of his equity calendar, and is thus not appealable as the denial of an injunction. Similarly, if the action is essentially at law, and the request is for a stay to determine a legal defense or counterclaim, the denial of the stay is merely the regulation of the law calendar and is not appealable as the denial of an injunction. Lyons v. Westinghouse, supra at 190-92.

First, BP's request was that Judge Judd in his capacity as chancellor stay the consideration of these counts so that BP could seek from the New Jersey Court equitable relief in the form of an order requiring that the settlement agreement be effectuated by the filing of the Stipulation of Dismissal with prejudice and entry of a judgment. The Stipulation of Dismissal incorporated by reference the settlement agreement of July 11, 1973, which constitutes a release of the claims asserted by Spiegel in counts II and IV-XVI of the New York complaint.

Second, the validity and effect of the settlement agreement depends upon the resolution of an issue which at common law was solely within the jurisdiction of the chancellor. Spiegel does not dispute the existence or interpretation of the settlement agreement. It only claims that it entered the agreement under "duress." It is clear that at common law duress was a legal defense in a contract action only if it were shown that the party claiming it entered the contract "under bodily restraint or fear of bodily harm", 14 Halsbury's Laws of England 479 (3d ed. 1955), and that resort to equity was necessary "where the compulsion is not of this extreme nature" and "there were such circumstances of pressure as to prevent the party being a free agent." Id. See also 1 Blackstone, Commentaries on the Laws of England *131 (Chase 4th ed. 1936). It is

only courts of equity that will "apply more liberal doctrines and will relieve a party from contracts or obligations into which he has been constrained to enter through modes of oppression or coercion . . . which destroy free agency, even if they would not amount to legal duress." Id. at n.4. See also Eadie v. Slimmon, 26 N.Y. 9, 12 (1862); Adams v. Irving National Bank, 116 N.Y. 606, 611-13 (1889).

In the present case, BP requested the chancellor to stay the proceeding on counts II-XVI pending the determination of BP's equitable claim on the settlement agreement, which turns wholly on Spiegel's equitable defense of duress. Thus, the denial of the stay is the equivalent of the denial of an injunction, and is therefore appealable under section 1292(a)(1) of the Judicial Code.

Since the denial of the stay is appealable, the court may also consider the denial of the transfer motion as an adjunct to its consideration of the denial of the stay, under the authority of Semmes Motors Inc., supra at 1201.

C. This Court Can and Should, If Necessary, Consider This Appeal As a Petition for a Writ of Mandamus

Even if there were no appeal right on any issue, the Court should treat the appeal on issues (i) and (ii)

as a petition for mandamus to correct the unconsidered and arbitrary refusal of the District Court to transfer this case to New Jersey or, at the very least, to stay it pending determination of the New Jersey suit which could put to rest 15 of the 16 counts raised in the New York complaint.

(i) Mandamus on Denial of Transfer or Stay

It is settled in this circuit and elsewhere that the grant or denial of a transfer request may be reviewed by the courts of appeals by writ of mandamus, authorized by the All Writs Act, 28 U.S.C. § 1651. See Pfizer, Inc. v. Lord, 447 F.2d 122, 125 (2d Cir. 1971); A. Olinick & Sons v. Dempster Brothers, Inc., 365 F.2d 439, 442-44 (2d Cir. 1966); Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir. 1950); 9 J. Moore, Federal Practice ¶ 110.13[6] at 175-181. Moreover, where mandamus is appropriate, an appeal will be treated as a request for mandamus. As stated in Western Geophysical Company of America v. Bolt Associates, Inc. 440 F.2d 765, 769 (2d Cir. 1971):

> "We have indicated that in an appropriate case, where a litigant has mistakenly sought to obtain by appeal relief that could properly be given only on mandamus, we might consider the appeal as a request for leave to file a petition for mandamus . . . ."

This Court recently treated an attempted appeal of a grant of a transfer motion as a motion for leave to file a petition

for mandamus. Aaacon Auto Transport, Inc. v. Ninfo, 490 F.2d 83 (2d Cir. 1974). Although the appeal was viewed as a request for leave to file a petition for mandamus, rather than as a petition for the writ itself (the practice followed in some other circuits), the end result is the same: peculiarities of appeal procedure will not be allowed to interfere with reviewing and correcting clear-cut abuses of discretion. See also International Products Corporation v. Koons, 325 F.2d 403, 407 (2d Cir. 1963); 9 J. Moore, Federal Practice, ¶ 110.28 at 316.

(ii) Standards for Mandamus

Perhaps the most frequently cited expression of the standard for mandamus on transfer issues is found in this Court's opinion in A. Olinick & Sons v. Dempster Brothers, Inc., supra. That case set forth the following standard:

> "Mandamus does not lie to review mere error . . . , but only to redress a clear-cut abuse of discretion." 365 F.2d at 445.

Judge Friendly, in his concurrence to the Olinick opinion, argued that a more restrictive test should be applied:

> "[O]ur power to issue mandamus is limited to those cases, exceedingly hard to imagine in this circuit, where a district judge has denied a transfer motion without even considering the merits or has granted or denied one in such flagrant defiance of accepted principles as to evidence impermissible motivation." 365 F.2d at 446.

The "clear-cut abuse of discretion" standard is the one which this Court has continued to follow, Pfizer, Inc. v. Lord, supra. As will be discussed in section II of this reply brief, however, we feel that this case so clearly falls within both the "clear-cut abuse of discretion" rule and the even more restrictive standard articulated by Judge Friendly that mandamus is warranted under both standards.

Mandamus is equally appropriate to review the denial of the stay, because the stay was sought to permit final entry of the New Jersey settlement (which included the release) and an accompanying judgment. The release and the judgment, or either, will bar 15 of the 16 counts of the New York complaint and eliminate the need for a trial on them. In these circumstances, as explained in more detail hereafter in section III, denial of the stay in the face of clear contrary precedents in this circuit is also a clear abuse of discretion. Cf. Lyons v. Westinghouse, supra at 186 (2d Cir. 1955), which dealt with the grant rather than the denial of a stay and therefore is based on a different rationale for mandamus--i.e., the preservation of the appeal court's jurisdiction.

D. If Neither the Injunction Nor the Stay Is Appealable, and If Mandamus Will Not Issue, Then a Disposition Like That in Stans v. Gagliardi Is Appropriate

Finally, even if the Court should conclude that it lacks jurisdiction of this appeal, and that mandamus is not appropriate, it should at the very least suggest that Judge Judd reconsider his ruling. In Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1974), this Court found that the petitioners were not entitled to mandamus directing the trial court to postpone the beginning of their criminal trial. Nevertheless, the Court stated that "had we been in the position of the trial judge, we would have granted at least the three-week extension . . . that was requested", and that it "thought it proper to state these views so that Judge Gagliardi may again consider the matter as we hope he will." 485 F.2d at 1291, 1292. A similar approach was recently adopted with respect to an order directing disclosure of grand jury minutes in Baker v. United States Steel Corp., 492 F.2d 1074, 1078-79 (2d Cir. 1974).

If there is no other means of redressing the District Court's error in this case, justice demands that this court follow the Stans and Baker precedent. Here, as discussion below and in our main brief makes clear, the District Court perfunctorily denied both transfer and stay when the

facts overwhelmingly called for one or the other, and indeed both, and when the prior cases in this court show that such relief should have been granted.

II

The Transfer Issue

The District Court's Arbitrary Refusal to Grant a Transfer Was a Clear-Cut Abuse of Discretion

When BP requested the District Court to transfer this case to New Jersey, it pointed out that, except for count I, the allegations of the remaining 15 counts of the New York complaint are a rehash of the claims made and released in New Jersey a year ago (A 111, A 161). The amended complaint in New Jersey described that action as follows:

> "NATURE OF ACTION.
>
> 1. This action is against two related oil companies (a parent and its subsidiary) for violations of the Sherman Antitrust Act, Sections 1 and 2. The action is being brought as a result of defendants refusal to deal with plaintiffs, their illegal tying agreements and unconscionable conduct with a design, motive, action, plan, arrangement and scheme to eliminate plaintiffs from competition; restrain trade and ultimately obtain monopolistic control of the distribution of gasoline and related products. Defendants also seek the elimination of the independent distributor in the oil industry, with the exception of those distributors who may agree or acquiesce to the standards, prices and other methods of operation dictated by defendants. The actions and conduct of defendants were and are discriminatory and illegal and a per se violation of the Sherman Act.

> Defendants' actions and conduct, with that of its co-participants, constitute a combination and conspiracy and restraint of trade and commerce, with the design and motivation to achieve higher prices and/or stabilize prices and control the supply and distribution of gasoline and related products." (A 162)*

This description fits almost exactly the complaint currently before the New York court. In fact, the New York complaint itself, after reciting in paragraphs 7-31 the alleged factual elements of Spiegel's claims, states in paragraph 32 that "the foregoing events caused Spiegel to commence" the New Jersey action. The precise similarity of the two complaints is apparent from the following outline of the counts in the New York complaint and cross-reference to the New Jersey complaint (which appears in Exhibit A to Document 3 in the Record):

> Count II BP's breach of the [1970] distributionship agreement and "express and implied agreements between the parties" (A25). Count V in New Jersey was the same (A165).

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* As is made clear in the affidavit of Alred L. Ferguson, one of BP's counsel in the New Jersey action (A 161-72), the plaintiffs in the New Jersey action were all Spiegel corporations, including the present plaintiff. This is contrary to the impression left by Spiegel's brief at p. 7 where it is states that Spiegel "joined [in the New Jersey action] with three other independent distributors . . . ." Moreover, the depositions for the preliminary injunction hearing in New Jersey and subsequent hearings before Judge Whipple, as well as the legal memoranda filed before the New Jersey court, all dealt with the same facts and contentions raised in counts II and IV-XVI of the New York action (A 163-69).

Count III	The July 11, 1973 settlement agreement is void. This of course relates directly to the New Jersey action, and to the Stipulation of Settlement and Dismissal, still to be entered in New Jersey, which specifically refers to the July 11 agreement (A173).
Count IV	BP and Sohio, by reason of their "entire relationship" with Spiegel, are engaged in a Sherman Act Section 1 conspiracy to restrain trade "in the wholesale and retail distribution of gasoline in the New York metropolitan area. . . ." Counts III and IV of the New Jersey complaint make the same allegations (A164-65), as does the description of that action in the New Jersey complaint (A162).
Count V	BP conspired with Power Test, another distributor, to eliminate Spiegel by denying Spiegel access to certain "through-put" facilities. Count II in New Jersey made the same claim (A164).
Count VI	Beginning as early as 1969, BP and Sohio have conspired with other oil companies to eliminate independent distributors, like Spiegel. Except for the claim that other non-defendant oil companies are involved, this charge, insofar as Spiegel is claimed to be affected, is no different from the New Jersey complaint's self-description, which, in fact, also refers to "co-participants." (A162).
Count VII	BP induced Spiegel to execute mortgages on the representation that gasoline supplies would be continued. The same claim was made in counts IV and V of the New Jersey complaint (A165).
Counts VIII-XVI	These counts allege no additional facts but merely re-label the previously alleged facts as "common law fraud", "gross negligence", "unfair competition", etc., etc. The release of claims in the July 11, 1973 contract, which is incorporated into the Stipulation of Settlement and Dismissal, should be a bar to these claims.*

* See Lyons v. Westinghouse, supra at 195 n. 1.

In addition to thus showing the rehash nature of counts II and IV-XVI, BP explained to the New York court through the Ferguson affidavit the nature of the July 11, 1973 settlement agreement, pointed out that a Stipulation of Settlement and Dismissal had been signed, and explained that a general release (which would cover all debts and other matters between the parties, in addition to the anti-trust and other claims already released by the July 11 letter) was delayed by the need to get a full accounting of various miscellaneous charges and payments, and then, later, by a new dispute which broke out over equipment Spiegel had agreed to purchase under item 4 of the July 11 agreement. *

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* The District Court's opinion inexplicably stated that the New Jersey action was not discontinued because BP "required releases of the anti-trust claims" and that the July 11 agreement "called for such releases." (A 372). It also stated that Spiegel's New York antitrust claim "is apparently a substantial claim, for the lack of a release of anti-trust claims has held up defendants' filing of the signed discontinuances of the New Jersey action." (A 377-78) The July 11 agreement, in para. 6, explicitly states that by Spiegel's assent to the agreement "you do hereby release BP" from any and all claims including antitrust claims, the only exception being for accounting matters which were to be worked out so that a general release, which would also include the accounting matters, could be signed (A 91). In fact, Spiegel's position is not that the antitrust claims were not released by the clear language of the July 11 agreement but that there was "duress". Thus the District Court here again simply miscomprehended the basic facts, and this fact concerning the release is very basic indeed.

The Ferguson affidavit also noted that on June 6, 1974, less than two weeks before the New York action was filed, BP had obtained in the New Jersey action an Order to Show Cause requiring Spiegel to appear before Judge Whipple and explain why it had not purchased the equipment as it had agreed. Spiegel thereupon quickly compromised that claim, so that no hearing was necessary.

It was for all these reasons that BP responded to the filing of the New York action on June 19, 1974 by requesting that it be transferred to New Jersey (A 128). Except for count I, which presents relatively simple legal issues under the EPAA and as to which there are few, if any, facts in dispute, the New York complaint deals with matters already dealt with in New Jersey at some length, and settled and released there a year ago. That settlement and release should be appraised against Spiegel's claims that it is void for duress in the court where all the events in question took place. It is noteworthy in this regard that Judge Whipple vacated a restraining order requiring BP to supply gas to Spiegel in May 1973, refused Spiegel's attempt for another restraining order when its contract was expiring on June 30, 1973, and ultimately denied a preliminary injunction July 11, 1973 (A 262-63; Judge Whipple's opinion appears in the Record in Exhibit A to Document 3). Judge Whipple is intimately

acquainted with the events of May-June 1973, which include all the "duress" aspects of Spiegel's claims which were pointed out when Judge Whipple denied a restraining order request as Spiegel's contract expired, and for this reason that court is more qualified than any other to weigh the merits of Spiegel's claim that the July 11 agreement with its release is void for duress.

We submit that this background made out an overwhelming case for transfer, and yet BP's motion to transfer was denied out of hand, with no reasons given. After a 15 minute hearing on June 26, 1974, the District Court granted a preliminary injunction (A139), its order making no reference to transfer. In its subsequent Memorandum and Order dated July 26, 1974, the District Court merely noted that "[t]he Court has denied a motion to transfer this action to New Jersey. . . ." (A373). No reasons were stated. Under these extreme circumstances, we submit that the District Court's refusal to transfer was a "clear-cut abuse of discretion", A. Olinick & Sons, supra at 445, and in fact, that it violated even the stricter standard of Judge Friendly's concurrence in Olinick because it was "denied without even considering the merits. . . ." 465 F.2d at 446. Furthermore, one can hardly imagine a more blatant attempt at forum shopping than Spiegel's filing of this action in the Eastern

District. Semmes Motors Inc., supra at 1203, strongly suggests that district courts in this circuit should discourage such practices, especially where duplicative litigation is the result; yet it was passed over here and condoned without a pause.

A second, somewhat similar rationale argues for issuance of mandamus to correct the decision of the District Court. In La Buy v. Howes Leather Co., 352 U.S. 249 (1957), the Supreme Court established the right of the courts of appeals to use the writ to promote economical and orderly administration within the district courts when normal appeal channels were unavilable or without meaning. See 9 J. Moore, Federal Practice, ¶ 110.28 at p. 317. Refusal to rule now on the District Court's transfer decision will effectively preclude any chance for review. BP will be forced to press forward in New Jersey for a final determination of the first Spiegel action while Spiegel will apparently continue to move forward in New York. The writ of mandamus should be issued to prevent both this waste of judicial effort and the almost inevitable resultant injury to BP. Circuit courts have used the prerogative writs before to ensure orderly litigation and to compel district courts to follow clear recent precedent. See, e.g., Erie Bank v. United States District Court for the District of Colorado, 362 F.2d

539 (10th Cir. 1966), and 9 J. Moore, Federal Practice, ¶ 110.28 at p. 309. This Court should not hesitate to assert control over a district court in a case where the reasons for transfer were compelling yet transfer was denied with no reasons stated.

III

The Stay Issue

The District Court's Arbitrary Refusal to Grant a Stay Was, In Light of the Semmes Decision, an Even More Clear-Cut Abuse of Discretion Than the Refusal to Transfer

At the commencement of the hearing in the District Court on July 12, 1974, BP handed up a copy of this Court's opinion in the Semmes case, supra (A 181-82). That case was also argued to the District Court orally (A 197-98), and in the briefs of both parties (A 377). This was done against the factual background outlined in section II above, and BP requested that the court stay the New York case as to counts II-XVI until final determination in the New Jersey action of the settlement and release issues. The District Court's opinion dealt with the point summarily as follows:

> "Both parties cited Semmes v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970), but it is particularly persuasive in support of plaintiff's position on the right to a preliminary injunction". (A 377)

It is quite impossible to justify this reading of Semmes since the factual situation, so far as relevant to the injunction, has no application here, and this Court simply concluded it could not reverse the injunction as an abuse of discretion. Semmes, however, is directly relevant on the stay issue, which the District Court ignored. Both Semmes, and the other cases it cites at 1202-03, make it quite clear that a prior action in another district should take priority over a second subsequently filed action unless "sound reasons" indicate the contrary, and "the instances where the second court should go forward despite the protests of a party to the first action where full justice can be done, should be rare indeed". Id. at 1203. In Semmes and the other precedents cited in Semmes, this Court reversed district court refusals to grant a stay. Despite these explicit guidelines, and the circumstances of the present case, the District Court refused the stay without even expressing any reasons.

IV

The Gasoline Supply Injunction

The District Court's Grant of the Gasoline Supply Injunction Without a Showing of Need Is a Reversible Abuse of Discretion

In addition to the cases cited at pages 19-23 of its main brief, BP calls the Court's attention to its recent opinion in SCM Corp. v. Xerox Corp., 1974-2 Trade Cases, ¶ 75,340 (2d Cir. November 4, 1974). There the Court stated that even where liability is admitted, the party seeking a preliminary injunction must carry the burden of demonstrating the possibility of immediate irreparable harm. Just as Xerox, for the limited purpose of a motion for preliminary injunction, admitted liability under SCM's antitrust claims, so BP conceded from the outset in the District Court that the EPAA requires the continued supply of gasoline to Spiegel (A 136). BP went even further than Xerox, however, in that it avowed, through the affidavit of a responsible corporate official (A 149), that such supply would be continued as long as federal law required it.

Spiegel's countering argument was that it needed gasoline to operate. That contention is beside the point. What is important is that Spiegel does not need an injunction to get gasoline. The District Court, again without explanation, turned this argument aside, stating as follows:

> "B.P.'s expressed willingness to comply with the provisions of the Emergency Petroleum Allocation Act concerning the sale of gasoline does not forestall plaintiff's right to an injunction, considering the history of the relations between plaintiff and B.P." (A 377).

The District Court did not explain what it meant by the "history" of the BP-Spiegel relationship. That relationship shows that BP gave Spiegel 19 months' notice that its supply contract would not be renewed after June 1973, although the contract only required 30 days' notice (A 56, 60); that, although Judge Whipple repeatedly denied Spiegel's requests for a restraining order and BP was under no obligation to do so, it agreed to an additional year's supply of gasoline in the settlement agreement of July 11, 1973 (A 262-63); that after the EPAA went into effect, and the Federal Energy Administration directed BP to increase the gallonage from the 18 million gallons provided for in the July 11 agreement to 25.8 million gallons, BP immediately did so (A 157), although it appealed for a redetermination as to gallonage since the 7 million

gallon difference between 18 and 25.8 was already being supplied to Spiegel by American Oil Corporation and Mobil Oil Corporation; that when the FEA on reconsideration directed that BP continue to supply 25.8 million gallons, ordering Spiegal however to reimburse such extra gallonage to American and Mobil, BP fully complied and has continued to comply with such directive; that even when Spiegel reneged on equipment purchases under the July 11, 1973 agreement, as explained in the Ferguson and Arnwine affidavits (A 170-72) and (A 150-51), thereby giving BP the right under the FEA order to stop gas supplies (A 159), BP did not do so but instead sought relief in the pending New Jersey action before Judge Whipple (A 171 and Exhibit B to Document 3 in the Record). Thus there was no evidence to support the District Court's conclusion that BP might attempt to terminate gasoline supplies to Spiegel in violation of the order; on the contrary, the history as well as BP affidavits submitted to the District Court made it absolutely clear that BP would not do so.

The District Court's opinion states that:

> "Even during the year after the settlement agreement, it was necessary for plaintiff to apply to the FEO on one occasion to require B.P. to continue its lawfully specified supply of gas." (A 373).

This reference was to the gallonage dispute described above where, in fact, Spiegel had been receiving a double allocation

because it was being supplied the same 7 million gallons both by BP and by American and Mobil. But quite apart from that question, there is nothing in that incident to warrant the District Court's conclusion that BP is somehow threatening to terminate Spiegel's gas supply. Proper administrative appeal channels were followed to resolve an honest dispute as to gallonage, and no threats of termination were made.

The issue for decision by this Court is a simple one. It does not involve, as Spiegel would have this Court believe, the alleged "bad acts" of large oil companies. It does not involve the continued existence of small neighborhood service stations. It involves only the propriety of a grant of injunctive relief when no evidence of need for that injunction has been or could be offered.

V

The Debt Collection Injunction

A. The District Court's Grant of the Debt Collection Injunction Without Any Showing of Need or Irreparable Injury Is a Reversible Abuse of Discretion

BP's primary argument on the debt collection issue is that Spiegel failed to show a sufficient threat of harm. It offered only vague generalities as to its inability to

pay off its long overdue obligation to BP; there was no concrete proof it would be seriously harmed in the effort. It is not enough, as the District Court erroneously held (A 374), for Spiegel to assert that refinancing would be more expensive than the current debt arrangements. Nor is it enough for Spiegel to show that it has a colorable claim for prohibiting collection of these debts. Any injury resulting from refinancing can be recouped at the time of a final judgment, if any, in favor of Spiegel. What must be demonstrated to the District Court, and not merely alleged in the rhetoric of an advocate's brief, is that Spiegel lacks the resources to pay the debt, and that the cost of refinancing is so prohibitive, or the availability of refinancing so non-existant, as to threaten irreparable harm if Spiegel is forced to pay. The simple truth is that no such showings were made. Spiegel produced no concrete financial data, apart from general ballpark statements of George Spiegel unsupported by any records, either as to its actual financial position or as to the actual values of the various properties in question.

It was, however, demonstrated that Spiegel was a major enterprise with assets of $4.5 to $5 million and obligations of only about $2.1 million (A 272). Spiegal made no showing that its unencumbered net worth of $2.5 to $3 million was not available as security for refinancing. In fact, George Spiegel's testimony indicates exactly the

opposite (A 272-74). Spiegel seems to argue, and the District Court to accept, that any debt arrangements that would require it to pay over 7 1/2% interest would constitute irreparable harm. It is doubtful if that position was ever correct, it certainly is not correct when the prime rate for loans is approximately 10 1/2%.*

There is every reason to believe, moreover, that Spiegel's properties are valuable both as service station locations and as general purpose marketing locations. Spiegel has within the last year sold at least 4 or 5 of the 27 stations which had been financed through mortgages from BP (A 276-78). If purchasers are available, it seems reasonable to assume that financing is available to those

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* Spiegel's brief at page 30 asserts that the 7 1/2% interest rate was "obviously satisfactory to BP" since it was arranged in July 1973 when BP was in a superior bargaining position which, from Spiegel's point of view, amounted to "duress". The fact that BP agreed to the 7 1/2%, when the prime rate was higher, simply shows that BP was reasonable. It acted on the assumption--now proved erroneous--that Spiegel would live up to the additional year's extension and pay the debt off by June 30, 1974. Furthermore, Spiegel's brief at page 8 exaggerates its straits in July 1973. There is no evidence that a single station was closed, Spiegal having stocked up prior to June 30 (A 336-37); the foreclosure actions in Nassau and Suffolk counties had nothing to do with gasoline supplies, Spiegel having transferred these stations at an earlier time to Mobil and American Oil but refused to pay off the mortgages to BP (A 113 and Exhibit C to Document 3 in Record). And George Spiegel apparently was not sufficiently concerned to go himself to Atlanta to sign the July 11, 1973 agreement; he sent his brother instead, who could have taken counsel if he wanted to.

purchasers and therefore presumably to Spiegel as well. Spiegel did not find it impossible a year ago to get a $400,000 short term loan from a bank, which is still being carried.

The crucial factor, however, is that it was the obligation of Spiegel, as the party seeking injunctive relief, to prove an inability to pay or unavailability of refinancing. Spiegel has the records to show the true facts but it did not choose to present them. While Spiegel asserted, probably correctly, that refinancing was unavailable at a level that could be covered by dealer rent payments (A 283), Spiegel did not demonstrate that higher priced financing was not available. (Contrary to Spiegel's brief at p. 28, the burden was not on BP to prove the availability of some form of financing on one or more of Spiegel's mortgaged stations.) Absent such a demonstration, an organization as large as Spiegel can make no claim of a threat of irreparable injury.

Spiegel's litigation moves are a further commentary on the unreality of its irreparable harm claim. It originally had 19 months notice that its contract would be terminated and that its indebtedness would be due. The very fact that it did not file suit in New Jersey until April 1973 suggests that payment of the indebtedness, which was then

$1.5 million, was not threatening it with disaster. If it had been, is it reasonable to assume that Spiegel would have waited until the last minute to bring suit? Similarly, Spiegel's present action was not filed until June 21, 1974, nine days before the debt, by that time only $791,000, was due.* This is the debt Spiegel agreed to pay a year before. Is it reasonable to assume that businessmen as resourceful as Spiegel's officers would on two occasions have run their business to the brink of destruction, depending merely on the chance that a court would grant an injunction at the last moment? If they did that once in New Jersey a year ago, would they have repeated the same mistake a second time after having been denied a preliminary injunction in New Jersey? Obviously, Spiegel is not as pressed or as threatened as it claims.

If collection of the particular notes requires foreclosure actions on particular pieces of property, these actions will provide, with respect to the property involved, the acid test of Spiegel's vague and generalized claims that payment cannot be made. Certainly Spiegel did not demonstrate in the District Court the basis for an injunction

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* See BP's main brief at page 9. While it does not appear in the Record, the debt, through property dispositions, has been reduced to about $542,000 as of December 10, 1974.

that freezes collection of these debts. BP should be allowed to proceed to collect the debts and to foreclose if necessary. This itself takes time. If foreclosure on any piece of property reaches a point where the actual sale of property is necessary, there will be time enough for Spiegel to come to court and prove irreparable harm as to that property.

B. The District Court's Injunction Prohibiting Collection of Spiegel's Debt To BP Is Not Authorized By The EPAA.

Although Spiegel's failure to show injury should make it unnecessary for this Court to reach the question whether the EPAA applies to the debt collection issues, it seems appropriate to reply briefly to Spiegel's substantial misstatement of the purview of the Act and FEA regulations adopted thereunder.

Spiegel emphasizes Section 210.62(a), which requires that "suppliers will deal with purchasers according to normal business practices". We have already shown at pages 29-30 of BP's main brief that this section does not apply to mortgages.

Spiegel also cites Section 212.31 of the FEA regulations in support of its argument that the term "price", as used in the regulations, should be broadly defined to include payments on long-term debt. As shown at pages 31-32 of

BP's main brief, however, this section is also inapplicable to the mortgage debt here.

The one case which Spiegel has cited to support its interpretation of the FEA regulations is as inapposite to this question as the very regulations upon which Spiegel has relied. Brennan Petroleum Products Co. v. Pasco Petroleum Co., 373 F. Supp. 1312 (D. Ariz. 1974), is limited to questions of the allocation of petroleum products under the EPAA and FEA regulations. Brennan deals with the effort to ensure that retailers receive the same gallonage supplied to them in 1972 base period. Brennan does not address in any way the issue of long-term debt or its treatment under the EPAA.

A more recent case, Guyer v. Cities Service Company, 381 F. Supp. 7 (E.D. Wisc. 1974), has held that the EPAA does not preclude a supplier from terminating dealer leases. Based on the legislative history of the Act, the district court there concluded that the removal from the Senate version of the Act of a clause prohibiting dealer terminations was a persuasive argument against an expansive reading of the Act to prohibit lease terminations. The court concluded that the lease termination issue was separate from the allocation issue and was beyond the language or the authority of the FEA regulations.

Similarly, this Court should refuse to adopt the expansive reading of the FEA regulations urged by Spiegel. As the Guyer opinion makes clear, all distributor-supplier relationships are not covered by the Act. The obligation to repay long-term debt in accordance with the terms of contractual arrangements is a fundamental aspect of commercial relationships and courts should be hesitant to undermine such relationships without the clearest of mandates from Congress. No such mandate, either clear or otherwise, can be found in the EPAA or the FEA regulations.

VI

Lack of Other Grounds For The Injunction

Spiegel claims that its antitrust, contract and tort claims in general are an alternative ground for the injunction. Judge Whipple decided the contrary a year ago. See Exhibit A to Document 3 in the Record. Furthermore, these claims were released by the July 11, 1973 agreement. Under these circumstances, Spiegel did not make out a case on these grounds for a preliminary injunction.

CONCLUSION

For the reasons stated above, and in its main brief, BP respectfully requests that this Court vacate as an abuse of discretion the unwarranted preliminary injunction issued by the Court below, stay further proceedings in this action pending determination of the New Jersey action, and order the case transferred to the District Court for the District of New Jersey.

Should this Court determine that it does not have jurisdiction of the injunction issues, BP respectfully requests that this appeal be viewed as a petition for a writ of mandamus and that such writ be issued directing stay and transfer. As a final alternative, BP requests, should the court refuse to grant the above relief, that it suggest that the District Court reconsider the issues, as was done in the cases cited at page 12, supra.

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Respectfully submitted,

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Civil Docket

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